(3)

IN THE HIGH COURT OF JUDICATURE OF BILASPUR CHHATTISGARH

CR.A. NO. 602 /2004

APPELLANT (IN-JAIL) : **Subhash, S/o. Balram, aged about 26 years, Occupation Cultivation, R/o. Salppadhar, P.S. Matle, District- Malkangiri (C.G.)**

21/06/04

29/7/04

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by Shri ... A. Sarkar ... Advocate

R to D.R. (J)

29/7/04

V E R S U S

RESPONDENT : **The State of Chhattisgarh, Through the District Magistrate Bastar at Jagdalpur (C.G.)**

MEMORANDUM OF CRIIMINAL APPEAL UNDER SECTION 374(2) OF CODE OF CRIMINAL PROCEDURE

A.F.R. (33)

HIGH COURT OF CHHATTISGARH AT BILASPUR

Criminal Appeal No. 602/2004

Before: Hon'ble Shri **Dilip Raosaheb Deshmukh, J.**

Subhash

Vs.

State of Chhattisgarh

Present:
Shri Shailendra Dubey, learned counsel with Shri Rajneesh Dubey for the appellant
Shri Arun Sao, Government Advocate for the State.

J U D G M E N T
(Delivered on 27th day of June 2006)

In this appeal, the appellant has assailed his conviction under Section 20 (b) (ii) (C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the Act of 1985') and the sentence of rigorous imprisonment for ten years and a fine of Rs.1 lakh in default of the same, to undergo additional R.I. for one year and six months, awarded by Shri R.S.Sharma, Special Judge, N.D.P.S. Act, Bastar, place Jagdalpur in Special case No.27/2003 vide judgment dated 12.11.2003.

2. Briefly stated the prosecution story is that on receiving secret information that the appellant was in possession of contraband *ganja*, Sub-Inspector Pramila Mandavi P.W.4, Station House Officer of Police Station Narharpur, after complying with the necessary legal formalities went to village Dumarpani and found the appellant in possession of 5 plastic bags containing *ganja* like substance. The suspected contraband article was weighed by Mohd. Yahya Memon P.W.3 vide Ex.P.9 and found to weigh 50 kilograms 200 grams. Two

samples of 100 grams each were taken and were sealed. The remaining *ganja* was also sealed in two different packets. The seal bore impression "M". F.I.R. was lodged vide Ex.P.17 by Sub-Inspector Pramila Mandavi on the same day. The *ganja* was entrusted for safe custody to the *Malkhana* vide Ex.P.1(C). On 6.6.2003 the two samples were delivered by Constable Kush Kumar Sahu No.512 in the Forensic Science Laboratory, Raipur. In its report Ex.P.29, while opining that the substance in both the sample packets was *ganja*, the impression of the seal found on the sample packets was also drawn and shown as "Police Department, Narharpur". After completion of investigation, the appellant was prosecuted under Section 20(b)(ii)(C) of the Act of 1985.

3. The appellant abjured the guilt, pleaded innocence and led no evidence in defence. The prosecution examined only four witnesses. It is shocking to find that the statements of witnesses in three different cases were recorded simultaneously and carbon copies were prepared and blank space was left for name of counsel and weight of *ganja* seized etc., which were filled in later. Relying upon the sole testimony of Sub-Inspector Pramila Mandavi P.W.4 and the report of Forensic Science Laboratory, the trial Judge convicted and sentenced the appellant as aforesaid in paragraph 1. After a very lengthy discussion of the evidence from paragraphs 16 to 29 in about eight pages, the trial Judge concluded that there was sufficient compliance of Section 50 of the Act of 1985 and ignored the decision of the Apex Court in *Gurbax Singh v. State of Haryana* 2001 CRI.L.J. 1166 and *State of Punjab v. Baldev Singh* 1999 (6) SCC 172 that the provision contained in Section 50 of the Act of 1985 applied only to personal search and was not attracted in the present case at all. It is also shocking to find that the learned trial Judge had perused the

report of F.S.L. (paragraph 56) and despite the glaring difference in the impression of seal on the *panchnama* Ex.P.10 and the seal found on the sample packets by the F.S.L., yet held in para 57 of the judgment that the seal affixed on the sample packets matched with the specimen impression of the seal prepared by Sub-Inspector Pramila Mandavi P.W.4.

4. Shri Shailendra Dubey, learned counsel for the appellant has argued that the possibility that the samples sent for chemical analysis to the F.S.L. had been tampered with could not be ruled out since the specimen impression of seal on *panchanama* Ex.P.10 and the impression of seal drawn by the F.S.L. were completely different. It was also contended that the *Malkhana* register Ex.P.1 (C) did not show that the seized quantity of *ganja* as also the sample packets were entrusted in a sealed condition for safe custody. Compliance of Section 55 of the Act of 1985 was also not proved due to which conviction of the appellant was bad in law. It was also contended that the evidence led by the prosecution did not establish that the *ganja* was recovered from the conscious possession of the appellant since the testimony of Ashok Kumar P.W.2 revealed that three persons, carrying contraband *ganja* in 15 bags weighing 1 quintal and 58 kilograms, were apprehended, and thereafter apportioning the *ganja* on random basis, all the three persons were separately prosecuted. On the other hand, although Shri Arun Sao, learned Government Advocate argued in support of the impugned judgment formally, yet he did not dispute the aforesaid factual submissions made by the learned counsel for the appellant.

5. Having considered the rival submissions, I have perused the record. At the very outset, it must be said that the manner in which Shri R.S.Sharma, the then Special Judge, N.D.P.S. Jagdalpur recorded

the evidence of witnesses by making carbon copies in three different cases, after leaving blank space for quantity and name of counsel in the deposition to be filled in later, shocks the judicial conscience of this Court and shows the most perfunctory manner in which Shri R.S.Sharma, learned Special Judge conducted the trial. In an offence under Section 20(b)(ii)(C) of the Act of 1985 which involved minimum imprisonment for 10 years and a minimum fine of Rs.1 lakh, the learned trial Judge before placing reliance on the report of F.S.L. did not apply his mind to the glaring difference in the impression of the seal drawn by the F.S.L. and the specimen impression of the seal drawn on Ex.P10. It appears that Shri R.S.Sharma, without application of judicial mind, mechanically recorded the finding that the seal on the sample packets matched with the specimen impression of the seal Ex.P.10 and convicted the appellant.

6. Specimen impression of the seal used for sealing the samples was affixed on Ex.P.10 which shows that either the seal had the mark "M" or "W" whereas the report of the F.S.L. clearly shows that the seal found on the sample packets had the impression "Police Department Narharpur". Head Constable Shiv Prasad Sonwani P.W.1 did not depose that the contraband *ganja* in two bags and two sample packets were entrusted to him for safe custody in a sealed condition. Copy of the *Malkhana* register Ex.P.1(C) also did not mention that the two bags or the two sample packets were entrusted in the *Malkhana* in a sealed condition. Constable Kush Kumar Sahu No.512 who took the samples to the F.S.L. was not examined by the prosecution. Thus, it cannot be ruled out that the sample packets sent for chemical analysis had been tampered with. Sub-Inspector Pramila Mandavi P.W.4 did not depose in her testimony that the seal affixed on the two sample packets prepared by her were of the S.H.O. of P.S. Narharpur. Thus,

there was total non-compliance of Section 55 of the Act of 1985 which also renders the conviction of the appellant bad in law in the aforesaid circumstances.

7. The testimony of Mohd. Yahya Memon P.W.3 also shows that the deposition of the witness in absolutely three different cases was recorded at one time by the learned trial Judge by making carbon copies and leaving blank space for the quantity of *ganja* and the name of counsel etc. His testimony clearly shows that contraband *ganja* was recovered from three different accused-persons by the Police and was weighed by him and found to be one quintal 58 grams and 400 grams. It appears that Sub-Inspector Pramila Mandavi randomly apportioned the *ganja* and prepared three different cases. Her testimony that the appellant alone was consciously carrying contraband *ganja* in 5 bags is rendered wholly unreliable due to the aforesaid facts and circumstances.

8. Madhu Ram, independent witness of seizure was also not examined by the prosecution in this case. The issue of conscious possession has also been dealt with in a most perfunctory manner in paragraph 43 of the judgment by the trial Judge Shri R.S. Sharma, without application of judicial mind. Independent witness Ashok Kumar P.W.2 who is the Sarpanch of village Dumanpani has categorically stated that 15 bags of *ganja* was kept in the bushes and the Police had apprehended the three accused persons who were present in Court. This also shows that the evidence of this witness in three distinct and different cases was recorded simultaneously by applying carbon sheets and leaving blank space for weight of *ganja* and name of counsel. In cross-examination also, this witness admitted that the Police had seized 15 bags of *ganja* from a pit. Mohd. Yahya Memon P.W.3 also deposed that 1 quintal 58 kilograms and 400 grams

ganja was recovered from three persons and the recovery was made from the three accused-persons who were present in Court. Again it shows that the three-accused persons in three distinct and separate cases were present in Court and evidence of this witness was recorded simultaneously in all the three cases after leaving blank space for the name of counsel and weight of *ganja.* The testimony of Sub-Inspector Pramila Mandavi P.W.4 also shows that on the same date she had proceeded against Prashant Arora and Budhram. Her statement was also recorded with the aid of carbon copy and necessary corrections were made relating to exhibits and blank space relating to the name of counsel which was filled in later on. Her testimony does not show the place where the 5 bags of *ganja* were kept by the accused. Considering the weight of *ganja* alleged to have been seized from the appellant, it is impossible that the appellant was carrying 5 bags of *ganja* on his person. This testimony of Sub-Inspector Pramila Mandavi P.W.4 does not show at all the places where the contraband *ganja* in 5 bags was kept and the reasons to show that it was in conscious possession of the appellant. It is also noteworthy that recovery memo Ex. P.5 also does not show the place where contraband *ganja* was kept in 5 bags. Weighment *Panchnama* Ex.P.9 shows that the *ganja* contained in 5 bags after weighment was transferred to two bags. However, the 5 empty bags in which the contraband *ganja* alleged to have been seized from the appellant were neither seized nor produced by the prosecution before the trial Court. Thus, there is no legal and reliable evidence on record to show that 50 Kgs. and 200 grams *ganja* was found in the conscious possession of the appellant.

9. Having thus considered the evidence led by the prosecution in its entirety, the following points emerge:

a) The possibility that the two sample packets sent for chemical analysis to the F.S.L. had been tampered with could not be ruled out.

b) Total non-compliance of Section 55 of the Act of 1985, in the facts and circumstances of this case, renders the conviction of the appellant bad in law.

c) The testimony of Head Constable Shiv Prasad Sonwani and the *Malkhana* register Ex.P.1(C) clearly show that the sample packets as also the *ganja* were not entrusted for safe custody at the *Malkhana* in a sealed condition.

d) There is no legal and reliable evidence to show that 50 Kgs. and 200 grams *ganja* was in the conscious possession of the appellant.

In view of the aforesaid facts and circumstances, conviction of the appellant under Section 20(b)(ii)(C) of the Act of 1985 and the sentence awarded thereunder deserves to be set aside.

10. In the result, the appeal is allowed. Conviction of the appellant under Section 20(b)(ii)(C) of the Act of 1985 and the sentence awarded thereunder are set aside. The appellant is acquitted and shall be set at liberty forthwith, if not required in any other case.

Sd-/
Dilip Raosaheb Deshmukh
Judge